Supreme Court, U.S.
FILED

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No. _____

# IN
# THE SUPREME COURT OF THE UNITED STATES OF AMERICA

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Glenn J. Hopkins,
Petitioner
VS
Godfathers Pizza Inc
Respondent

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**ON PETITON FOR A WRIT OF CERTIORARI**
FROM THE SEVENTH CIRCUIT
COURT OF APPEALS USAP7, N0. 04-4172

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For Petitioner:
William Shaffer, Attorney at Law
1638 S. MacArthur Blvd
Springfield Illinois 62704
217-522-9880

# QUESTIONS PRESENTED

## Issue I.

As to whether or not the Americans with Disabilities act applies to the Federal Courts with the same equivalent force and effect as the act applies to the State Courts, in re Tennessee v Lane, 539 U.S. 941 (2004), requiring the District Courts to make reasonable accommodations for the mentally impaired as a matter of due process?

## Issue II.

That it is a hitherto unanswered question by this U.S. Supreme Court as to whether or not the accommodation provisions of the Americans with Disabilities Act creates a cause of action from a failure to accommodate *both the permanent and the temporary impairments* of an otherwise qualified disabled individual, as the test of TOYOTA V. WILLIAMS 534 U.S. 184 (2002) is used to determine if a person has a qualifying impairment, and is not to be used to determine if that person's *other impairments* must also meet the ADA definitions

as a condition to require the employer to accommodate them, in re Chevron v Echazebal?

Issue III.

As to whether or not the District Court and 7th Circuit Court of Appeals is in conflict with this U.S. Supreme Court's policy, in re Edelman v Lynchburg College, 533 U.S. 928, and Chevron U.S. A. Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837, 843-844 (1984), by excluding from Judicial proceedings the complaint letters as a charge filed with the IDHR on grounds it was not sworn at the time of filing pursuant to District Court rules, requiring a new trial?

Issue IV.

As to whether or not the District Court has denied Hopkins due process of law by failing to recuse herself for lack of proper impartiality due to Hopkins Civil rights action in re; Hopkins v Illinois 03-3274, as is supposedly required under 28 USC-§ 455(a), in re Liteky v United States, 510 U.S. 540 (1994)?

Issue V.

As to whether or not the 7th Circuit Court of Appeals "policy" of restricting appellate review of ADA Summary Judgment proceedings to just discretional review whenever there has been a post trial motion to reconsider under rule 59, *is a form of arbitrary sanctions* that in this case violates the 1st Amendment right to petition for redress, and is an abuse of power that is not within the article III powers of the Court of Appeals?

Issue VI.

As to whether or not Hopkins, as a memory impaired, brain damaged individual, was denied fair due process of law by being allowed to be exploited by the District Court as he was deposed pursuant to the Federal Rules of Civil procedure three years after the events in question without the protection of being represented by Counsel?

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This cause comes before this U.S. Supreme Court on the unanswered questions of as to whether or not; (1) the Americans with Disabilities Act applies in any way to the Federal Courts, and (2) raising for the first time the question *as to how much pain and injury a disabled person must endure as a condition of his employment before he is protected by the accommodation provisions of the ADA in the District Courts*, -Do the accommodation provisions of the ADA proactively protect a disabled employee from the acts of negligent indifference by a covered employer in refusing to accommodate *both the permanent and the temporary impairments* of a qualified individual with a qualifying disability? and (3) is the Court of Appeals policy of restricting review of ADA summary Judgments after a rule 59 motion an abuse of power by the Appeals Court in substantive violation of the 1st Amendment?

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## Constitutional provisions

### Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, *and to petition the government for a redress of grievances.*

Statutory provisions

*Title I of the Americans with Disabilities act 42-U.S.C. Sec. 12111(3)* Direct threat: The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

*Title I of the Americans with Disabilities act 42-USC-Sec.12111(8)* Qualified individual with a disability: The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

*Title I of the Americans with Disabilities act 42-U.S.C. Sec. 12112(5)* (a) Not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or (b) Denying employment opportunities

to a job applicant or employee Who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

*Title II of the Americans with Disabilities act, 42-U.S.C. Sec. 12131.* - Definitions As used in this subchapter: (1) Public entity: The term "public entity" means (A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and (C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4) [1] of title 49). (2) Qualified individual with a disability: The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

*Title II of the Americans with Disabilities act, 42-U.S.C. Sec. 12132.* – Discrimination: Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the

services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

*Rule 59. New Trials; Amendment of Judgments a) Grounds.* A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. Any motion for a new trial shall be filed no later than 10 days after entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. No later than 10 days after entry of judgment the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

(e) Motion to Alter or Amend a Judgment. Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

-Judicial Notice-

The Definition of the term "washing dishes" as used within this cause describes the use of commercial restaurant type sinks measuring approximately 55 inches high, with three tubs approximately 24-30 inches deep. Approximates have to be used in this case as both Godfathers and the District Court refused Hopkins access to the facility for purposes of measurement and photographs.

Hopkins v Illinois, 03-3274 was a Title II ADA action filed 12-8-2003, dismissed March 29, 2004, on 11th Amendment grounds, and D.C. COURT OF APPEALS v. FELDMAN, 460 U.S. 462. Final judgment entered April 20, 2004, relating to a prior appeal to

this Court identified as Hopkins v Northbrook, No. 03-5882, Certiorari Denied Oct 15, 2003.

**Jurisdiction**

Hopkins action in the District Court was under the Americans with Disabilities Act, over which the District Court held jurisdiction under 28-U.S.C.-1331. The 7th Circuit Court of Appeals held jurisdiction under 28-U.S.C.-1291, affirmed the appeal on July 13, 2005, and denied a Petition for Rehearing En Banc on October 19, 2005. This U. S. Supreme Court thus has Jurisdiction under 28-U.S.C.-1254 as of 12-15-2005.

**Statement of the Case**

Hopkins is a disabled person within the definition of the Social Security Administration's rules due to serious spinal impairments defined as a degenerative interveterbral disc disease of the lumbar spine (low back), creating intense pain and difficulty in bending over, and limiting the lifting of any weights above 25 pounds, and has brain damage affecting memory. Hopkins now Petitions this U.S. Supreme Court for a Writ of Certiorari, or

for alternative relief, arising from an action under Title I of the ADA, (Americans with Disabilities Act) in the U.S. District Court of the Central District of Illinois, in which Hopkins was denied the necessary accommodations for his impairments by the District Court, and was given an inaccurate adjudication of his claims by the District Court when the Court followed the rules in an overly stringent manner allegedly due to an antipathy towards Hopkins that can only be accounted for from his having opposed discrimination by a "close friend" and former associate on the State bench in her Court. (Judicial Notice, in re Hopkins v Illinois, 03-3274.)

Hopkins's cause of action in the District Court was under the accommodation provisions of the Americans with Disabilities Act, 42-U.S.C.-Sec.12111(3) and Sec.12112(5), alleging as to Count I, A Failure to accommodate claim based on Hopkins spinal impairments in (a) being made to

"*wash dishes*" as part of his regular duties as a delivery driver, (which *in this case* meant Hopkins was working bent over at the waist over a 24 inch deep set of waist high sinks, bobbing up and down as he was moving dishes in and out of the sinks, which had placed direct strain *right on the point of the lumbar spine* where his primary back injury exists) and (b) being ordered to "*wash dishes*" as part of his jobs regular duties as a delivery driver with 3rd degree burns on his left hand, (resulting in a dangerous infection,) which was alleged to be a negligently tortuous injury; and as to Count II, A Failure to accommodate claim in being again required to wash dishes as part of his job duties as a delivery driver, with a retaliatory reduction of hours after opposing this continuous failure to accommodate Hopkins Spinal impairments by Wright, that culminated in a constructive discharge.

During the course of these District Court proceedings, Hopkins was denied the appointment of counsel, was required to prepare his case without access to the facilities, denied access to witnesses, and denied timely access to accurate records by the District Court. Hopkins was forcibly deposed without counsel. Hopkins Counsel entered his appearance at the end of discovery, receiving only a short extension to try to repair the case.

Hopkins Counsel pointed out to the District Court on Motion for Summary Judgment that to maintain a failure to accommodate claim under the ADA, Hopkins had clearly proven his failure to accommodate claim in that: (1) Hopkins did show by medical records that he was disabled with a Degenerative Interveterbral disc disease of the lumbar spine, and brain damage affecting memory; (2) Hopkins did show he was qualified to perform

the essential duties of the position of driver, *which was delivery*, provided that his spinal impairments were accommodated in *not being required to wash dishes, scrub floors, and take out garbage cans*, (3) Hopkins did show that the hiring accommodations *of not being required to wash dishes, scrub floors, and take out the garbage cans* was denied by Wright in her capacity as store manager because she admitted that *she did not see it as necessary*, in her interrogatory.

Godfathers also moved for Summary Judgment, reversing all prior held positions and raised issues that Godfathers *did not define* prior to raising them in the *District Court* as to just what Hopkins impairments were, Godfathers did not state what kind of accommodations was needed for these impairments, or show a doctors report on Hopkins impairments in support of their claims of having made the necessary accommodations for

Hopkins impairments, and did not state what kind of accommodations was made for these impairments or even identify by whom these accommodation(s) were made. Godfathers claimed to the Court that there was no actual legal obligation under the ADA to accommodate Hopkins as to the washing of dishes because the affected impairments were accommodated, leaving only the issue of the burns, which were themselves only a temporary impairment that did not qualify for ADA protection under Toyota v Williams, and thus there was no obligation to accommodate them, with Godfathers telling the Court that *the other qualifying impairment(s)* did not matter in this case as Godfathers had accommodated these impairments whenever Hopkins had asked, a contention based only on Hopkins deposition.

## STATEMENT AS TO THE DISTRICT COURTS DECISION

The District Court stated that while Hopkins is a qualified individual with a qualifying disability, and that Godfathers knew of his impairments, thus meeting two of the three legs required for an action under the ADA, there was in this case *no evidence of Hopkins having suffered an "adverse employment decision because of his disability"* that is required to maintain a failure to accommodate claim under. DVORAK V MOSTARDI PLATT ASSOCIATES, INC. 289 F.3d 479, 483 (7th Circuit.) The District Court "explained" that (1), There was no failure to accommodate in Wright's requiring Hopkins as a qualified individual with a qualifying impairment to wash dishes[1] as part of his job duties with burns on his hand because the burns were temporary impairments not covered by the ADA, in re; TOYOTA MOTOR MFG., KY. INC. V.

[1] The District Court failed to understand the nature of the dishwashing claim. See Definition* on page 20.

WILLIAMS 534 U.S. 184 (2002), and *Hopkins other impairments did not matter as these had been accommodated**, and; (2) Wright did not actually transfer Hopkins from his being a Driver to a dishwasher, and; (3) Wright's termination of Hopkins was immediately reversed by Godfathers, and; (4) Hopkins returned after unpaid medical leave to work for one week, only to resign voluntarily one week later after his hours had been reduced. The District Court then ruled that the Charge letter to the IDHR was inadmissible evidence as it was not signed and certified at the time it was filed with the Illinois Department of Human Rights, and thus *there was no proof that Hopkins hours were reduced for improper reasons.*

Hopkins timely Motion to reconsider pointed out there had been a fraud upon the Court, obstruction of justice in *the omission of records*, and *scrambled records*, the *denial of access to witnesses by the Court*, and serious judicial error in

both the facts, and the interpretation and application of the accommodation provisions of the ADA, but the District Court denied the Motion, *selectively avoiding the issues of fraud and obstruction*. The Appeals Court of the 7th Circuit refused to review the Summary judgment Denovo, also selectively *avoiding the issues of fraud* because Hopkins used a Motion under Rule 59 (mislabeled as a Petition under rule 60 due to the fraud issue, but was filed within the 10 days allowed for rule 59 motions), arbitrarily using the abuse of discretion standard *while admittedly treating the rule 59 Motion the same as a rule 60 Petition for Relief.*

- STATEMENT OF THE FACTS -

(1) Hopkins is a "disabled person" under Social Security Disability rules, having multiple severe physical and mental impairments. The nature of these multiple impairments consists of: (1) A neuromuscular-skeletal disorder of the spine described herein as (a) an injury to Hopkins spinal cord causing sharply reduced skin sensitivity (numbness) in hands, arms, and right side torso,

(b) Degenerative Interveterbral disc disease of the lower spine (lumbar) creating intense pain and difficulty in bending and lifting, (2) Post-traumatic brain damage affecting short term and long-term memory, Cognitive judgment, and a severe anxiety disorder. (R.A. PLAINTIFF'S RESPONSE TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT, page 6, Plaintiff's Motion for Summary Judgment, Exhibit A, pages 24 to 34.)

(2) Hopkins applied for the position of Delivery driver on January 13, 2001, disclosing his various impairments and that he could perform the essential duties of the position of a delivery driver provided there was accommodation for his impairments. (R.A PLAINTIFF'S RESPONSE TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT, page 6, page 21).

(3) On January 19, 2001, Perry Crowley hired Hopkins for the position of Pizza Delivery Driver for part time employment. Perry Crowley made the necessary accommodations for Hopkins spinal impairments consisting of (1) Hopkins was not to be required to perform the duty identified as "washing dishes" *except when it was only absolutely necessary*, meaning to Hopkins understanding only when there would be no one else to do it, and (2) Hopkins was not to be required to scrub floors, haul garbage or perform other similar heavy labor tasks that were included into the position of Delivery driver.

(4) Over the course of six months, from January 19 to June 24, of 2001, the accommodations made for Hopkins impairment by the assistant manager Perry Crowley, were in turn admittedly denied by Godfathers store manager Beth Wright, who stated *she did not see it as necessary*. Since Hopkins only worked with Wright on average of once per week at that time, Hopkins had no cause to do more than just complain about the denial of accommodations. (R. A. PLAINTIFF'S RESPONSE TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT, page 21, 43).

(5) On May 10, 2001, Hopkins was injured off the job, causing third degree burns on his left hand, had reported this to Perry Crowley, and was allowed to continue working with accommodations for this additional impairment. (R.A. Motion for Summary Judgment, exhibit B, page 35.) On May 12, the Store manager, Wright, was working, and she proceeded to order Hopkins to wash dishes with the other drivers, instructing him to remove the bandages from his hand so as to wash dishes with the other drivers. (R.A. Motion for Summary Judgment, exhibit B, page 38). In addition to this, Wright also informed Hopkins that he was being transferred to the position of Dishwasher Bus Person, to be effective May 17, 2001. (R.A., Motion for Summary Judgment, exhibit J, page 51, exhibit C, page 38, exhibit B, page 35).

(6) Hopkins protested this disregard for his impairments, and opposed this transfer from May 12 to May 17, until Hopkins ultimately refused to accept this treatment any further, and refused the reassignment of job duties. Hopkins refused to clock in on May 17, explaining to his supervisor Rochelle that for reasons of his spinal impairments he refused to be the store dishwasher. Hopkins explained that he was leaving to seek medical care since his hand was now infected and bleeding that was caused by being required by Wright to wash dishes with burns on his hand for which he needed to seek medical attention. Hopkins stated he would come in to discuss the problems on the next day with Wright since she had deliberately left before these issues could be discussed. (R.A., Motion for Summary Judgment, exhibit B, page 35).

(7) On the next day, May 18, 2001, Wright terminated Hopkins for his opposition to her employment practices; his refusal to accept the transfer mandated by Wright was called by her "job abandonment." Hopkins filed a telephone complaint of discrimination to Deanna Lofton of Godfathers Corporate claiming a violation of the ADA based on failure to accommodate and of retaliatory termination. Lofton turned the matter over to Teresa Piersee (R.A., Motion for Summary Judgment, exhibit B, page 35).

(8) Piersee temporarily reversed Wright later that same day, reinstating Hopkins as a driver. (R.A., Motion for Summary Judgment, exhibit B, page 35).

(9) In response to Hopkins complaint to Corporate which had restored Hopkins to employment as a driver, Hopkins was admittedly placed by Wright on "indefinite suspension" without pay for the reason of the infection of his left hand, with Hopkins not allowed to return to work until he could wash dishes as part of his job duties. Wright admitted that she did not initiate Workman's compensation arising from the infection. (R.A., Motion for Summary Judgment, exhibit J, page 53, page 55).

(10) Upon his return from this imposed leave on June 11, 2001, Wright admittedly proceeded to require Hopkins to again wash dishes and take out garbage as part of his job duties, then chose the very next week thereafter to reduce Hopkins scheduled hours of employment from 18 to 11 hours. When questioned as to why, Wright stated that she had enough drivers, and did not need Hopkins in the hours formerly worked by Hopkins. (R.A. Motion for Summary Judgment, exhibit J, page 53, page 55).

(11) Protests about this conduct as a form of constructive termination was made to Godfathers Corporate. Piersee stated by phone that this was Wrights right to do. (R.A., Plaintiff's response to Defendants Motion for Summary Judgment, page 119).

(12) When the schedule for the next week showed a further reduction in hours to eight hours, Wright explained this was her choice, that she did not need Hopkins, and that Hopkins was at least working. This reduction of Hopkins hours was, with the continued denial of accommodations, the straw that broke the camels back, and seeing the issue as pointless to continue, Hopkins filed a second complaint of failure to accommodate his impairments, and of the retaliatory reduction in hours in violation of the ADA by Fax, and submitted his resignation to Deana Lofton of Godfathers on June 24, 2001 explaining the facts in detail, and filing a copy of the same document in person as a complaint with the Illinois Department of Human Rights on June 25.

**-REASONS FOR REVIEW-**

**(1.) Due Process under the ADA**

Pursuant to this U.S. Supreme Court's decision in re Tennessee v Lane 539 U.S. 941 (2004), *any Court's* denial to a disabled person with brain damage, *of access to appointed legal Counsel*, (in re Powell v Alabama, 287 U.S. 45 (1932), and of *Access to necessary records*, (in re Griffin v Illinois 351 U.S. 12 (1956), and of *Access to witnesses*, is a failure to accommodate that has been declared a denial of due process.

In this cause the U.S. District Court has required Hopkins, known to the Court to be a disabled person *with brain damage*, to prepare and prosecute his ADA action *without the benefit of appointed Counsel, denied access to witnesses, denied access to facilities and accurate records, and despite his protests, ordered by the Court to be deposed even if he did not have counsel, or have his case dismissed, and thus Hopkins was compelled to be deposed and was in effect "was allowed" to be exploited as a brain damaged individual without the protection of counsel*. The 7th Circuit Court of Appeal's refuses to consider discrimination by the District Court, claiming *Hopkins has not raised the issue before the District Court-but the issues were raised, but there is no clear rule on this issue as to when and how it must be raised!*

The issue of counsel was raised by Hopkins to the District Court first in the Motion to reconsider leave to file as a pauper, in all the pretrial phone conferences, and there were several Motions to compel Godfathers to disclose records and witnesses that were denied, and several post trial documents pointing out the Courts refusing to compel discovery and disclosure of witnesses, *that combined have compromised Hopkins ability to prepare and present his claims.* The issue is thus timely and properly before this Court in its supervisory capacity, as a matter of due process under federal law, see Bank of Nova Scotia v. United States, 487 U.S. 250, 254-255 (1988), entitling Hopkins to a new trial.

**(2.) ADA Question in employment.**

This case raises the question as to *how much pain, suffering and abuse a disabled person must accept as a condition of their employment before such a disabled party is protected by the*

*accommodation provisions of the ADA.* A reasonable person would believe that accommodations for the protection of the health of disabled employees was mandatory, see Chevron U.S.  A. & NBSP; Inc. v Echazabal, 534 U. S. 991, but the District Court limits the issue of Chevron to hiring only, see appendix b, page 56.

There is no clear consensus about this accommodation issue among the Circuit Courts, for example, noting the 1st Cir. (1996) in re; Jacques v. Clean-Up Group, Inc.,96 F.3d 506, 511, in which the 1st Circuit finds that "Discrimination in the employment context under 42-U.S.C.-12112(5) of the ADA is defined as *"the denial of the necessary accommodations that would otherwise enable a qualified individual with a qualifying disability to work at a position they desired."* Then there is the 9th Circuits Kimbro v. Atlantic Richfield Co., 889 F.2d 869, 878-79 (which is often cited by this Court to define the ADA based on the rehabilitation act.)

The District Court clearly states that Kimbro doesn't even apply to ADA cases, see appendix b, page 56. Contrast this with the 7th Circuit, in re Dvorak v Mostardi Platt Associates, Inc. 289 F.3d 479, 483, which holds that a party must have suffered an adverse employment action as a condition to maintain an action under the ADA- An adverse employment action is generally defined in the 7th Circuit as *a materially adverse change in the terms and conditions of Employment.*

In this Case, based on Dvorak, the District Court "found" that it was not a failure to accommodate Hopkins's spinal impairment by being made to "*wash dishes*" as part of his job duties as a delivery driver! The District Court added that a failure to accommodate claim cannot be maintained without "an adverse employment decision due to a party's disability" citing Dvorak while stating *there had been no such overt act of discrimination based on Hopkins disability*.

The District Court came to this conclusion *without ever performing a proper analysis of the case*. It should be noted here that: (a.) Wright admitted in her Deposition that when Hopkins was hired, accommodations for Hopkins spinal impairment had been made by assistant manager Perry Crowley, an agreement that was kept by the two supervisors, Rochelle Shoup and Larry Rhodes, and; (b.) *Wright* admitted in her interrogatory that Hopkins spinal impairment, a known painful and debilitating Interveterbral disc disease of the low back, *was not accommodated* when she admitted that she treated Hopkins no differently than the other drivers, and made him wash dishes. Thus, while Hopkins clearly *could* perform this job duty if he was ordered to, *and had been ordered to even when he had burns on his hand, it was known to be also be very painful and debilitating.*

{*It must be understood by this Court that *"washing dishes" in this case* meant Hopkins was required to work *bent over at his waist* over a 24 inch deep set of three waist high sinks, essentially bobbing up and down as he was moving dishes in and out of the sinks, which placed direct strain *right on the point of the lumbar spine* where his primary back injury exists! *It must be noted also that The District Court accepted only those claims of Hopkins that Godfathers agreed with.*}

Hopkins was admittedly required to wash dishes and scrub floors and take out garbage cans as part of his job duties as a delivery driver, and was terminated for opposing her practice, see Wright's Deposition, and upon being restored, Hopkins hours were reduced. How much more of an *"adverse change"* in the terms and conditions of Hopkins employment that he as a disabled person could be reasonably "required" to endure in order to have a cause under the ADA? *Just How much pain and suffering is required by the Federal Courts before* the law is found to actually protect the disabled from indifferent employers?

**(3.) Conflict between a Circuit Court and this Court:** This Supreme Court, in re Edelman v Lynchburg College, 533 U.S. 928, found that the District Courts are required to give some deference to agencies in their proceedings under Chevron U.S. A. Inc. v. Natural Resources Defense Counsel, Inc.467 U.S. 837, 843-844 (1984).

The ADA is a remedial process that is initiated by disabled laymen. In the processing of those claims the District Court is required to make some deference to these Agencies use of their own procedures and rules in the filing of charges, in re Edelman, so as to prohibit the undermining of the intent and purpose of the agencies in question by the actions of either party, and by unreasonable actions of the Courts themselves. The 7th Circuit in this cause has stated that the District Court *did not abuse her discression* in finding the complaint charge to the IDHR was inadmissible because it

was not initiated with the Illinois Dept. of Human Rights as the rules of the District Courts require.

This case constructively nulls this Supreme Courts holding in re Edelman, and is intellectually unsound, and detrimental to society itself.

(4.) **The 7th Circuits policy** in re the Federal Rules of Procedures under rule 59, violates the First Amendment and is thus invalid, as it was the intent and purpose of Congress that rule 59 of the Federal Rules of Civil procedure would provide a remedy for judicial errors of law and fact that would reduce the use of unnecessary appeals, which is consistent with the intent and purpose of the rules to promote fairness and reduce the cost of litigation. The Right to petition the Courts of Appeal for relief from error is one of the most precious rights We have to protect us from the "mistakes" of the judicial process, so while the Courts may regulate the use of these 1st amendment rights by describing when and how

such may be taken, the Courts cannot arbitrarily destroy this right, see Johnson v Avery, 393 U.S. 483, 485 (1969). It is constitutionally indefensible for any Court of appeals to constructively "*sanction*" any party for exercising that 1st Amendment right to seek redress from a real perceived error by the timely use of the prescribed procedures, see Thomas v Collins 323 U.S. 516, 65 S. Ct 315, L. ed. 430 (1944).

The Seventh Circuit Court of appeals has thus imposed *"a condition"* upon the use of rule 59 that any appellate review would then be limited to just abuse of discression, an arbitrary form of sanctions *due only to that Courts concerns about possible misuse of the motion*, see Neal v Newspaper Holdings Inc, 349 F.3d 363, 368 (7th Cir. 2003.) Any concerns by the Lower Courts about the potential misuse of the rule is strictly a matter for Congress *or this U.S. Supreme Court to address*.

Research has not shown *any of the other Circuits adopting a similar policy*, and it is not seen as being within the Article III powers of the Courts of Appeal to modify the rules of procedure with such pointless severity as has been shown here by the 7th Circuit Appeals Court's refusal to review the appeal for error in a Summary Judgment proceeding by Denovo review, see in re Bank of Nova Scotiā v. United States 487 U.S. 250 254-255 (1988). This policy on the part of the Appeals court to limit review of a Motion for reconsideration under rule 59(e) of a Summary Judgment proceeding to a standard of Abuse of discretion, where the judicial error *must in turn be so fundamental that it cannot be reasonably justified, is only justifiable when it is applied to rule 60 motions*. Such a policy applied towards rule 59 allows ordinary error, fraud, and misrepresentation *to just pass through the appellate review procedure without capacity for*

*correction*, corrupting both the intent and purpose of the Appeals Courts as first tier error review, in re; Halbert v Michigan 543 U.S.___ (03-10198) (2005), and California Motor Transport 404 U.S. 512-513 (1972). Appeals from summary judgments after motions to reconsider under rule 59(e) should be subject to review just like Summary Judgments, as conventional wisdom equates a Rule 59 Post Trial Motion to reconsider to be just a continuance of the judgment effecting a stay so as to give the Court the opportunity to consider what may have been misunderstood, omitted, or concealed, then the proceeding should go on to be reviewed De Novo in all cases of Summary Judgment to prevent serious injustice in re Tumey v Ohio. 273 U.S. 510.

**(5.) Judicial lack of Impartiality denying due process:** District Court Judge Jean Scott clearly does not like Hopkins *since Hopkins had*

*brought an action before her Court accusing one of her close friends and former associates of High Crimes and misdemeanors, see* Hopkins v Illinois 03-3274. *This animus-is clearly demonstrated by the District Court in this case.* The District Court clearly not only did not appoint counsel to Hopkins as a disabled indigent with brain damage, but has also denied Hopkins access to essential witnesses, and the timely access to vital documentation. This has made Hopkins ADA action meaningless from the start, contrary to what this U.S. Supreme Court has held since Powell v Alabama. The District Court furthermore acted *angry* when it was pointed out by Hopkins Counsel on Motion to reconsider that the records submitted by Godfathers in discovery had been intentionally tendered *incomplete,* scrambled, and was missing key pieces *that did not become available until after Godfathers had moved for summary judgment, which had not been deciphered until after the*

*Court had ruled, but* the District Court, despite being Fairly told about this devious concealment and obstruction of justice by Defendants, scolded Hopkins Counsel *for not having raised these issues timely*, which is utterly ridiculous behavior, contrary to Degan v United States, 517 U.S. 820 (1996). This Court has not yet addressed as to just *when and how* a party can raise the issue that a District Court has failed to recuse themselves due to lack of impartiality, in re Liteky v United States, 510 U.S. 540 (1994). The 7th Circuit has refused to even consider it based on an uneven interpretation of the rules rather than its merit.

**(6.) There has been Fraud upon the Court.**

For purposes of obtaining a Summary Judgment, Godfathers *deceitfully did not define to the District Court* just what Hopkins impairments were that they admitted to accommodating, *which is a very important omission*, did not state what kind of accommodations was needed for these

impairment(s), and did not state what kind of accommodations was supposedly made for these impairment(s) or even identify by whom these accommodation(s) were made. *This is important*, because Godfathers has *deceitfully* represented to the District Court that Godfathers had made all the necessary accommodations for Hopkins impairments, "whenever asked" based on Hopkins deposition. *A Half truth is still a lie*, as demonstrated by the admitted fact that Perry Crowley, in his capacity as the assistant manager, did accommodate Hopkins impairment, *but this statement* ***was also false***, as demonstrated by *the admitted fact* that Wright, in her capacity as the Store manager, admittedly *did not make the effort to accommodate Hopkins spinal impairments* in her interrogatory. Hopkins is entitled to a new trial before an impartial court that is less "accepting" of fraud and half truths.

**(7.) Deposing the mentally impaired** is a denial of the very concept of Due process, particularly if that person is not represented and protected by counsel. With all due respect to this Court, a memory impaired person cannot be realistically be expected to recall competently the events in question of an incident that occurred three years prior. *It reaches the level of absurdity for any court to accept a deposition as a competent representation of facts from a person who is memory impaired*, especially to the extent Hopkins is. (80% according to the tests. This means he can only recall accurately about 23% of various events unless he has written them down. Then it rises to only 70% recall.) *He is not sufficiently competent to be deposed without the benefit of Counsel.*

## CONCLUSION

Hopkins brought all his actions before Judge Scott in the good faith belief *that at least in the federal courts his rights as a disabled person*

*would be respected.* The District Court in this case cannot be said to have considered the case in the best light for Hopkins as the Court paid no attention to the fact that being required to wash dishes and scrub floors with his spinal impairment was cruel and unusual treatment that posed serious risks to Hopkins health, the Court did not pay real attention to the law, and very little to the merits of Hopkins claims.

*Hopkins prays that this Supreme Court shall grant certiorari, or whatever relief this Court finds appropriate.*

OATH AND AFFIRMATION

We affirm that the foregoing is true except as to statements made upon information and belief, and as to those, We believe them to be true. Witness our hand under the penalties of perjury this 7th day of December, 2005
Witness our Hand;

Glenn J. Hopkins

William Shaffer

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Appendix A

United States District Court

Central District of Illinois

Hopkins v Godfathers Pizza Inc. No. CV-02-3206

Judge Jean Scott, Order of Summary Judgment

August 24, 2004

This matter comes before the Court on Plaintiff Glenn J. Hopkins motion for Summary Judgment (d/e 54) and Defendant Godfathers Pizza Inc and Beth Wrights Motion for Summary Judgment (d/e 57). Plaintiff claims that Defendants discriminated (count I) and retaliated (Count II) against him in violation of the Americans with Disabilities Act, 42-U.S.C. sect 12102 et Seq. (ADA) For the reasons set forth below, Plaintiff's Motion for summary judgment is denied, and Defendants Motion for summary judgment is allowed.

STATEMENT OF FACTS

On January 19, 2001, Hopkins began working for Godfathers Pizza Inc. (Godfathers), as a part time delivery driver at the South Dirksen Parkway store in Springfield Illinois. On January 13, 2001, prior to beginning work, Hopkins discussed the job description for a part time delivery driver with assistant store manager Perry Crowley (Crowley).

Crowley told Hopkins that the part time delivery driver job description includes the job descriptions for the dish/bus position and back of house position. Hopkins told Crowley that he had a preexisting neuromuscular condition that limited his ability to lift and bend. Crowley indicated that

Godfathers would accommodate Hopkins disability. Memorandum in support of Defendants Motion for summary Judgment (d/e 58) (Defendants Memorandum) exh A, Deposition of Glenn Hopkins, page 134-135.

In addition to delivering Pizzas Hopkins also mopped floors, performed general cleaning, brought dishes in, loaded and unloaded dish racks, cleaned dishes, restocked clean dishes, restocked stations, folded boxes, and hauled trash. Id, at 124-27, 131-32, 143. Over the course of his employment Hopkins encountered tasks that he could do with accommodation and others he could not do at all. Hopkins limitations were accommodated by Godfathers in several ways. For example. He discovered that he had difficulty standing and folding boxes at the same time and was allowed to fold boxes while kneeling in the back beyond the view of the customers. Id at 120.

In addition Hopkins testified that he was given help lifting the dough mixing bowl when it was filled with water or the bowl was left empty of water specifically so it would not be too heavy for him to lift. ID. At 122. Hopkins was also excused from performing jobs precluded by his disability such as taking out the trash which required heavy lifting and cleaning the walls which required balancing on a ladder. Id at 125-26-143.

From January 22, 2001 through May 10, 2001, Hopkins had no complaints about his work environment at Godfathers, his supervisors

accommodated all of his physical challenges. Id at 128.

On May 10, 2001, Hopkins severely burned his left hand in a non work related incident. He was excused from washing dishes as part of his job as a delivery driver on May 10-11 2001 due to the burn, but was asked to wash dishes again by Beth Wright (Wright) store manager on May 12 2001 because the dishwasher had been fired. ID. At 148-49. Further, Wright told Hopkins that on May 17 2001 he would be a dishwasher, not a delivery driver, Id at 146. Hopkins does not know if Wright intended for him to wash dishes for just one day on the 17th, or if she intended him to become the permanent dishwasher on May 17, 2001. Hopkins felt he could perform as the dishwasher for one day to help out, but would not be able to handle the dishwasher position permanently because the physical demands of the job would be too demanding for him to Perform consistently. Id at 147. On May 17, 2001, Hopkins arrived at work early to talk with Wright to clarify if his change to dishwasher was permanent or temporary. Wright was very busy, however, and left the store before Hopkins was able to talk to her. Id at 151. Further, the burns on Hopkins left hand had become severely infected and were bleeding. Hopkins testified that Assistant manager Rochelle Shoup told him to seek medical treatment for his hand and return with a doctors note. Id. At 152. Hopkins left and sought medical treatment for his hand.

On May 18, Hopkins returned with his doctors note. He was informed by Wright that he was fired for abandoning his job on May 17, 2001. Id. At 153. Hopkins protested and showed Wright his Doctors note, to no avail. Hopkins then called Godfathers Human resources department to protest that same day. Theresa Piersee (Piersee) Director of Human resources, over ruled Wrights decision to fire Hopkins, and told him to return to work as delivery driver after his doctor released him to work again. Id at 155.

By June 6, 2001, Hopkins left hand had healed sufficiently his doctor released him to return to work. Id exh G. Hopkins was reassigned to the June 11-17 2001 work schedule and worked 17.57 hours that week. He also worked 9.05 hours during the week of June 18-24 2001. When the schedule for the week of June 25- July1 2001 was posted, Hopkins claims he was scheduled to work only eight hours. Id at 156. He complained to Wright that he was not scheduled to work enough hours. He explained to Wright that he needed more hours to pay off a traffic ticket and that failing to pay off the ticket could jeopardize his drivers license. Id at 157. Wright did not increase Hopkins scheduled hours. Hopkins contacted Godfathers Human resources department to complain about his scheduled hours but was told that scheduling was within the discretion of the store manager. Id. At 173. Hopkins submitted his voluntary resignation by fax to Piersee on June 24, 2001, and began seeking employment elsewhere. Id at 174.

ANALYSIS

At summary Judgment the movant must present evidence that demonstrates the absence of a genuine issue of material fact, Cellotex Corp v Catrett, 477 U.S. 317, 323-24 (1986). The Court must consider the evidence presented in the light most favorable to the non moving party. Any doubt as to the existence of a genuine issue for trial is resolved against the moving party, Anderson v Liberty Lobby Inc. 477 U.S. 242, 255 (1986). Once the moving party has produced evidence showing that it is entitled to summary judgment, the non moving party must present evidence that shows that issues of fact still remain. Matsushita Elec. Indus. Co Ltd, v Zenith Radio Corp. 475 U.S. 574, 586. (1986). When viewed in the light most favorable to Hopkins, the Court finds the Defendants are entitled to summary judgment.

I. Beth Wright as an individual defendant

As an initial matter, Defendants are correct that Hopkins cannot hold Beth Wright liable for his claims of discrimination and retaliation under the ADA, Silk v City of Chicago, 194 F.3d 788, 797 n.5 (7th Circuit 1999) ("Our case law is clear that a supervisor cannot be held liable in his individual capacity under the ADA or under Title VII,"); see also Shotz v City of Plantation Florida, 344 F.3d 1161. 1172 n 17 (11th Circuit 2003). ( concluding that a supervisor cannot be held liable in his or her individual capacity under the ADA, and citing cases approving that principle from the 6th, 7thm 10th, and 11th Circuits). Accordingly, Beth Wright

is dismissed as an individual defendant in this case.

II Count I: Discrimination

Defendants Dispute that Hopkins has established a prima facie case of discrimination under the ADA. To establish a prima Facie case, a plaintiff must show that he: (1) had a qualified disability as defined by the ADA: (2) had the qualifications to perform the essential functions of the job either with or without reasonable accommodation; and (3) suffered an adverse employment action because of his disability. Dvorak v Mostardi Platt Associates, Inc. 289 F.3d 479, 483 (7th Cir.2002).

Hopkins presents evidence of several injuries that affected his employment at Godfathers: (1) a severely burned left hand that he suffered in a non work related incident on May 10, 2001; and (2) a pre existing neuromuscular condition incurred before he began to work at Godfathers. Hopkins burned hand is not a qualified disability within the meaning of the ADA. As noted by the Supreme Court, "the impairments impact must also be permanent or long term." TOYOTA MOTOR MFG., KY. INC. V. WILLIAMS 534 U.S. 184 (2002). Citing 29 CFR sect 1630.2(j)(2)(ii)(iii) (2003). Further, intermittent episodic impairments are not disabilities, the standard example being a broken leg. VandeZande v State of Wisconsin Dept of Admin, 44 F.3d 538, 544 (1995). Less than one month after Hopkins burned his left hand, it had sufficiently healed for him to return to work.

Accordingly, Hopkins burn injury to his left hand was neither permanent nor long term, and that injury cannot serve as the basis for a qualified disability for Hopkins ADA claim. {footnote 1 Hopkins also argues that Godfathers requirement that not return to work until he was released by his doctor was a failure to accommodate his disability. Hopkins contends he could have done some work despite his injured hand. Hopkins burned hand is not a qualified disability under the ADA. Accordingly the Defendants were under no obligation to accommodate it.}

Defendant's do not dispute that Hopkins neuromuscular condition makes him a disabled person within the meaning of the ADA, or that he was qualified to perform the essential functions of his job. Defendants memorandum, pg 13. Accordingly for purposes of the parties cross motions for summary judgment that Hopkins had satisfied the first two prongs of the prima facie case.

Hopkins cannot show, however, that he suffered an adverse employment decision because of his disability. On May 18, 2001, Wright fired Hopkins because she thought he had walked off the job on May 17, 2001. Defendants memorandum, ech a, Deposition of Glenn Hopkins, pgs 171-72, Exh f, Deposition of Beth Wright, pg 52. There is no evidence that Wright fired Hopkins because of his disability.{Footnote 2; To the contrary, Hopkins testified that he felt Wright wanted him to work as a dishwasher on May 17 2001 because he felt she

considered him to be one of her most dependable employees. Id. Ex A. Deposition of Glenn Hopkins, pgs 169-70. Hopkins testified that Wright did not consider his disability throughout the whole incident. He stated "she knew I was dependable. She just never took into account I was too screwed up to the handle the position. And When I started protesting, she was just too busy to try to understand why I was squeaking. She was just too preoccupied at the time and it became a problem."} Further, this decision was immediately reversed by Theresa Piersee, who reinstated Hopkins to his job as a part time delivery driver on May 18, 2001. Id Exh A, Deposition of Glenn Hopkins, pgs 154-55. Additionally it is undisputed that during the rest of his tenure at Godfathers, Hopkins suffered no additional adverse employment decisions based on his disability. Hopkins returned to work during the week of June 11-17, 2001, and voluntarily resigned on June 24, 2001. {Footnote 3:Even if Hopkins claimed he was constructively discharged, there is no evidence Godfathers forced him to quit because of his neuromuscular condition.}

Therefore Hopkins has not set forth a prima facie case of employment discrimination under the ADA. Defendants Motion for Summary Judgment as to Count I is allowed, Plaintiffs Motion for summary judgment as to count I is denied.

III. Count II, Retaliation.

Hopkins claims that his hours were reduced in the weeks after he returned to work in June in retaliation for his complaint to Teresa Piersee on May 18, 2001. Plaintiffs motion for summary judgment (d/e 54) (plaintiffs motion), pg 18. He further claims no other driver suffered a reduction in hours, the store did not reduce its operations, and that the hours he had previously worked were given to another driver. In response, Defendants argue that Hopkins hours were not reduced, and that he has failed to establish a prima facie claim of retaliation under the ADA.

To establish his retaliation claim, Hopkins may present direct evidence of discrimination, or indirect evidence under the burden shifting method described by the Supreme Court in McDonnell Douglas Corp v Green. 411 U.S. 792 (1973) Stone v City of Indianapolis public utilities Div, 281 F.3d 640, 644 (7th Circuit, 2002). Hopkins has not presented direct evidence of discrimination. Accordingly, he must establish that (1) he engaged in statutorily protected activity, (2) that he was doing his job in a satisfactory manner, (3) he suffered an adverse employment action, and (4) other employees who did not engage in a statutorily protected activity were not subjected to an adverse employment action. If the Defendants non discriminatory reason is not rebutted by Hopkins, then Defendants are entitled to summary judgment.

Within the meaning of the ADA, an adverse employment action includes loss or reduction of pay or monetary benefits, but can encompass many other forms of adversity...such as job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and the other terms conditions and privileges of employment. Silk, 194 F.3d at 800, quoting 42-U.S.C. 12112(a). Hopkins was cleared to return to work from his hand injury on June 6, 2001, which was in the middle of a scheduling period. Hopkins was added to the schedule for the following week, June 11-17, 2001, and also worked the week of June 18-24 2001, before voluntarily resigning on June 24, 2001. {footnote 4: Hopkins complains that Defendants have not produced personnel records for the week of June 25- July 1, 2001 and argues that the Court should also evaluate the amount of hours he was scheduled to work that week in order to determine whether he subject to retaliatory treatment by Wright. The Court declines to do so for several reasons. First, the number of hours Hopkins might have worked in that period are speculative since the record shows variation between the number of hours scheduled and those worked for the entire period Hopkins was employed by Godfathers. Second, Hopkins entered into an agreed protective order (d/e41) issue by this Court on February 23, 2004, that applied to personnel information for all employees of godfathers between January 19, 2001, and June 25, 2001. *Hopkins cannot claim*

*Defendants failure to produce records not covered by the agreed protective order is insufficient production of personnel records during discovery}*

In support of his claim that his hours were reduced, Hopkins cites the Court to the complaint he filed with the Illinois Department of Human rights (IDHR). Plaintiffs motion, exh J. On motion for summary judgment, supporting affidavits must be sworn or certified. Fed Rule Civ. P 56(e) Hopkins complaint to the IDHR is not a sworn statement. Accordingly it is not sufficient to support his claims that; (1) upon his return to work, his hours were reduced from an average of 24 hours to 17 hours for the first two weeks of the pay period, 11 hours for the second pay period, and scheduled for 8 hours for the next pay period; or 2, that during the same period there was no reduction in overall hours on all drivers nor reduction in store operations. Plaintiffs motion, pg18. Further, Hopkins claims that his hours were given to a newly hired employee, and cites exhibit h in support of that assertion. Exhibit H provides no information about work schedules or hours worked by employee, and Hopkins does not identify the other employee who supposedly received his work hours. Accordingly, the evidence Hopkins presents does not support his motion for summary judgment on his claim Defendants retaliated against him.

In support of Defendants motion, Defendants submitted payroll audits as proof of Hopkins

weekly work record. Defendants memorandum, exh I. Hopkins has claimed that he had no problems with his employment in the period January 19 to May 10, 2001. Defendants memorandum, Exh A Deposition of Glenn Hopkins, pg 128.

To determine if Hopkins hours were reduced in retaliation for his complaint, the Court compares his work schedule for the periods January 22, 2001 to May 6, 2001. To simplify a week to week comparison of hours worked, the Court begins its analysis on January 22, 2001, the first Monday after January 19, 2001, and ends it on May 6, 2001, the last Sunday before May 10, 2001. For the period January 22, 2001 through May 6, 2001, Hopkins worked the following hours per week.

| | |
|---|---|
| January 22-26 | 24.20 |
| January 29 to February 4 | 22.85 |
| February 5-11$^{th}$, | 11.84 |
| February 12-18 | 21.63 |
| February 19-25 | 14.67 |
| February 26-March 4 | 24.87 |
| March 5-11 | 23.65 |
| March 12-18 | 18.57 |
| March 19-25 | 19.12 |
| March 26 to April 1, | 7.18 |
| April 2 -8 | 17.51 |
| April 9 -15 | 14.03 |
| April 16-22 | 17.77 |
| April 23-29 | 24.48 |
| April 30-May 6 | 14.63 |

Id. Exh I.

Theresa Piersee* attests that the fluctuation in Hopkins work hours reflects the normal flow of Godfathers business operations. "Hours for crew including delivery drivers fluctuates on a weekly basis depending on sales projections." Affidavit of Theresa Piersee. Hopkins provides the Court with no additional explanation for the fluctuation of his hours from week to week. Accordingly, the Court assumes the variation was caused by business operations, and not by vacation, illness, or other abnormal events specific to Hopkins himself.

Hopkins hours worked in the fifteen week period between January 22, 2001 and May 6, 2001 ranged from a low of 7.18 hours worked in the week of March 26- April 1 2001 to a high of 24.87 hours worked in the week of February 26-March 4, 2001. The average number of hours worked in that period was 18.47 hours per week. {footnote 5 The Court arrived at this calculation by summing the number of hours worked in the fifteen week period and dividing the total by fifteen weeks. The result was rounded off to the nearest hundredth of an hour.}

In comparison, Hopkins worked the following hours in the two week allegedly retaliatory period;

June 11-17 17.57
June 18-24 9.05

**Piersee was not allowed to be deposed nor required to answer interrogatories by the Court.*

In the week of June 11-17, 2001, Hopkins worked slightly less than his average hours per week, but more hours that he worked in six of the fifteen weeks between January 22, 2001, to May 6, 2001. {Footnote 6; Hopkins worked less than 17.57 hours in the following weeks; February 5-11, (11.84 hours) February 19—25 (14.67 hours) March 26-April 1, (7.18 hours) April 2-8, (17.51 hours) April 9-15 (14.03 hours) and April 30-May 6, (14.63 hours).}

In the second week, June 18-24, 2001, Hopkins worked his second lowest number of hours in the periods evaluated. He worked even fewer hours in the week of February 5-11, 2001. Yet Hopkins testified he had no employment problems during those weeks, even though he worked comparable hours to the hours he worked during the week of June 18-24 2001. Thus Hopkins two week work record between June 11-24 2001 does not show that his hours were reduced in retaliation for his complaint on May 18, 2001 when compared with his work record in the period January 22-May 6, 2001. Hopkins hours in the week of June 11-17 2001 were close to average, and his hours worked in the week of June 18-24 2001, while below average, were comparable to two previous work weeks about which Hopkins had no complaint.

In addition, during the two week period that Hopkins worked after he returned from medical leave he worked more than any other part time driver.

At that point, it appears Mark Jackson was working full time. The other part time drivers were working fewer hours per week or no hours , during that period. {Footnote 7: in the week of June 11-17, 2001, Hopkins worked 17.57 Mark Jackson worked 39.91 hours, Cameron Scovern worked 10.01 hours, and James Clinton worked 1.02 hours. In the week of June 18 to 24, 2001, Mark Jackson work 40.00 hours, Hopkins worked 9.05 hours, Dylan Goller worked 4.77 hours, and Cameron Scovern worked no hours, Exh I Defendants motion for Summary Judgment.}

Therefore Hopkins has not established a prima facie case of retaliation because he has not shown that he suffered an adverse employment action, and he has not shown that other part time delivery drivers were not subject to a similar reduction in work hours. Defendants Motion for Summary Judgment as to Count II is allowed, and Plaintiffs is denied.

Conclusion

Therefore Defendants motion for summary judgment (d/e57) is allowed, and Plaintiffs motion for summary judgment (d/e 54) is denied. This case is closed. It is therefore so ordered, August 20, 2004.

Appendix B

United States District Court

Central District of Illinois

Hopkins v Godfathers Pizza Inc. No. CV-02-3206

Judge Jean Scott, Order of denial of Motion to reconsider, November 16, 2004:

This matter comes before this Court on Plaintiff Glenn J Hopkins (Hopkins) Rule 60(b)(6) Petition for Relief from Judgment (d/e/66) (original Petition), with attached memoranda in support of Plaintiffs rule 60 (b)(6) petition for relief from summary judgment,(memoranda) and Plaintiffs rule 60 (B)(6) Petition for Relief from Summary Judgment (d/e 67) (signed petition) with attached addendum to rul60 Petition for relief from summary judgment (Addendum) {Foot note 1; Hopkins original petition was unsigned. Accordingly this Court granted leave for Hopkins Counsel William Shaffer to file a signed petition. August 27 2004 txt order. Attorney Shaffer did so by filing Plaintiffs signed petition, which is identical to plaintiffs original petition. Alongside Plaintiffs signed petition however, Hopkins submitted his addendum, which advances additional arguments in support of his petitions. Hopkins provides no explanation why his addendum was not incorporated into his memorandum. Further, there is no provision in the local rules for Plaintiffs addendum, which also violates the page limitation for memoranda in support of motions. Local rule 7.1.b Defendant Godfathers Pizza inc however has not objected to

Plaintiffs addendum. Accordingly, with abundance of caution, the court will consider it on Plaintiffs petitions.}Hopkins petitions this Court for relief from its August 20 order (d/e 64) denying Plaintiffs motion for summary judgment (d/e/ 54) and allowing Defendants motion for summary judgment (d/e 57). For the reasons set forth below, both the original and signed petitions are denied.

This Courts August 20, 2004 order sets forth the facts and procedural history relevant to Hopkins Petitions. Accordingly, the Court proceeds directly to Hopkins petitions which were timely filed. Hopkins contends that this Courts August 20, 2004 order was entered in error for at least five reasons; (1) error as a matter of law by requiring Hopkins to prove Godfathers intent to discriminate against him; (2) error as a matter of law for finding Hopkins infected Hand was not an ADA qualified disability; (3) failure to admit Hopkins Illinois Department of Human rights (IDHR) complaint as evidence in contravention of existing law, (4) error as a matter of law in concluding that Hopkins did not set forth a prima facie case of retaliation; and (5) premature entry of summary judgment before Hopkins filed additional relevant and material pleadings. Hopkins petitions also attempt to introduce new evidence in support of his retaliation claim.

Under the Federal rules of Civil Procedure(b) a party can petition for relief on several grounds:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Id.

Rule 60 (b)s purpose is to permit a court to modify a judgment to incorporate factual information that comes to light only after judgment and could not have been learned earlier. A Contention that the judge erred with respect to materials in the record is not within rule 60s scope, Gleash v Yuswak, 308 F.3d 758, 761 (7th Circuit, 2002) (internal citations omitted.) Further, a judgment may not be reopened under rule 60 (b) except in compelling and extraordinary circumstances, Metlyn Realty Corp and Esmark Inc. 763 F.2d 826, 831 (7th Circuit, 1985).

In contrast, a motion pursuant to rule 59(e) is suitable for challenging a Courts application of law and facts. The purpose of rule 59(e) is to allow a party to direct the courts attention to newly discovered material evidence or a manifest error of law or fact and enables the Court to correct its own errors and thus avoid unnecessary appellate procedures. Moro v Shell Oil Co. 91F.3d 872 (7th circuit 1996). A "manifest error of law" has been defined as the "wholesale disregard, misapplication, or failure to recognize controlling precedent." Sedrak v Callahan 987 F. Supp 1063 1069 (N.D. Ill. 1997) To succeed, a rule 59(e) motion must clearly establish either a manifest error of law or fact or must present newly discovered evidence. LB Credit Corp v Resolution trust corp, 49 F.3d 1263, 1267 (7th Circuit 1995) quoting Federal Deposit ins. Corp v Meyer, 781 F.2d 1260 1268 (7th Circuit 1986). Accordingly, although Hopkins seeks reconsideration under Rule 60 (b)(6) alone, this Court evaluates his Petitions under both rule 59(e) and 60(b) Cosgrove v Bartolotta. 150 F.3d 729, 732 (7th Circuit 1998). (if filed within the proper time, a court should interpret the claims made in a motion and not limit its analysis to the label attached by the moving party because captions do not control.

For reasons set forth below, Hopkins petitions are denied.

ANALYSIS

I. Count I: Discrimination

This Court ruled that Hopkins had not established a prima facie case of employment discrimination under the Americans with Disabilities act (ADA) because he did not show that he had suffered an adverse employment decision based on his disability. August 20 2004 order, pg 9. The Courts holding was based on the following evidence, viewed in the light most favorable to Hopkins. On May 17, 2001, Hopkins arrived at work early to ask Godfathers store manager Beth Wright (Wright) if she intended him to work as a dishwasher for only one night, or to permanently change his job from delivery driver to dishwasher. Id at 4. Wright left work before he could ask his question. At that time, however, Hopkins was suffering from a severe hand infection. Assistant Manager Rochelle Shoup told him to leave work to seek medical treatment and then return with a doctors note. Id. Upon hi return on May 18, 2001, Wright fired Hopkins because she thought he had walked off the job on May 17 2001. {Footnote 2: Hopkins argues that Wright fired him not only for walking off the job, but also because he was unable and refused to perform the duties of a dishwasher. Plaintiffs Addendum, pg 11. Even if Wright fired Hopkins both for walking off the job and for refusing to perform as a dishwasher, however, Godfathers immediately reversed Wrights decision and reinstated Hopkins

as a delivery driver. There was no adverse employment action.}

After he was fired, Hopkins immediately complained to Theresa Piersee (Piersee) director of Human resources for Godfathers Pizza, who reversed Wrights decision that same day and reinstated Hopkins as a delivery Driver. She told Hopkins to return to work as soon as his infected hand healed sufficiently to allow his doctor to release him. Id at 5. On these facts, the Court concluded Hopkins suffered no adverse employment action because Wrights precipitous action had been immediately rectified by Piersee.

In his petitions, Hopkins argues that the Court reached this conclusion in error. He characterizes the Courts holding as requiring that Hopkins:

...show "intent to discriminate" was the motivating factor in Wrights decisions to deny (Hopkins) accommodations and transfer Plaintiff from Delivery Driver to Dishwasher, and show that intent to discriminate was the motivating factor in Wrights decision to fire (Hopkins) for walking off the job in protest of this denial of accommodations...

Plaintiff's addendum, pg 5. Hopkins argues that his reinstatement was immaterial as to whether he had suffered an adverse employment action. Plaintiff's memoranda. Pg11.

Hopkins mischaracterizes the Courts Holding. First, the Court did not rule on whether Wright had failed to accommodate Hopkins disability by transferring him from his position as a delivery

driver to that of dishwasher because Hopkins testimony revealed such a transfer never occurred.

Hopkins testified that he came into work early on May 17, 2001to talk to Wright to clarify if she wanted him to become the full time dishwasher or just work as the Dishwasher that day. Appendix of exhibits in support of Defendants motion for summary judgment (d/e 59) (Defendants Exhibits) Exh. A Deposition of Glenn Hopkins, pg 146. Hopkins testified that he never determined what Wright intended.

q. After May 17, you're going to be the dishwasher?

A. yes.

Q. Forever, or for one day, or for what?

A. I could never get an answer on that.

Q, Did you know, and do you know all the way up til today, whether (Wright) wanted you to wash dishes just on that one day (may 17 2001) or were you going to become the permanent dishwasher forever?

A. I have no clue to this day.

Id. Hopkins did not work on May 17, 2001 due to his hand infection, and was fired the next day before any job change could take place. Id. At 153. Therefore to the extent that the Court did not rule on Hopkins claim of employment discrimination, based on Wrights alleged failure to accommodate his disability by transferring him to the dishwasher position, the Court now grants summary judgment in favor of Defendants on it.

The Court did however evaluate whether Hopkins had presented evidence sufficient to support a prima facie cause of employment discrimination based on his May 18 2001 discharge by Wright. Using the test set forth in Dvorak v Mostardi Platt Associates, Inc. the Court found that while Hopkins had established the first two prongs of the test, Piersee's immediate reversal of Wrights discharge and reinstatement of Hopkins as a delivery driver prevented him from establishing that he had suffered an adverse employment decision because of his disability. Dvorak v Mostardi Platt Associates, Inc. 289 F.3d 479, 483 (7th Cir. 2002); see also August 20, 2004 order, pg 7. Hopkins points to no precedent that the Court made a manifest error of law in so finding, and he presents no undiscovered material facts to cause reconsideration of the Courts holding. Therefore Hopkins petitions on this ground are denied.

Hopkins also takes issue with the Courts finding that his severely burned hand, which became infected after he washed dishes at work on May 12, 2001, was not an ADA qualified disability that Godfather was required to accommodate. August 20, 2004 Order, pgs 7-8. Hopkins claims that the Courts holding essentially undermines the purpose and intent of the ADA which intended to restrain and deter potential violators from exploiting the disabled by the use of coercion and duress. (Plaintiff's Addendum, pg 11.)

Hopkins cites both the Supreme Courts holdings in Chevron U.S.A Inc. v Echazabal and Tennessee v Lane, as well as the 9th Circuits opinion in Kimbro v Atlantic Richfield Co, in support of this conclusion. See Chevron U.S.A. Inc. v Echazabal, 536 U.S. 73 (2002) Tennessee v Lane ___U.S. __124 S.Ct 1978 (2004); Kimbro v Atlantic Richfield, 889 F.2d 869 (9th Cir. 1989). (footnote. The Court notes that although Mr. Shaffer , Hopkins's counsel, refers to the supreme court decisions in Chevron U.S.A. Inc. v Echazabal, and Tennessee v Lane, he cites the court to the ninth and sixth circuits opinions respectively, instead of to the supreme Court opinions (reversing in Echazabal, and affirming in Lane.) Later in his pleading he commits the same error by citing the Fourth circuits earlier opinion in Edelman v Lynchburg college instead of to the supreme Court's subsequent decision reversing the circuit court. Plaintiffs addendum, pgs 4, 13. Unfortunately, this is not the extent of Mr. Shaffer's carelessness. Mr. Shaffer also submitted an incomplete citation to Kimbro v Atlantic Richfield Co. and set no citation at all to Criado v IBM Corp. Plaintiff's Addendum pg4. Through out his memoranda, Mr Shaffer also failed to pin cite direct quotes on numerous occasions. Id at 6, 8 14. In the future Mr. Shaffer is directed to exercise due care when preparing pleadings to be filed in this Court.)

None of the aforementioned case show that this Court erred in finding that Hopkins severely burned hand did not constitute an ADA qualified Disability. Kimbro concerned a Washington state anti discrimination law, not the ADA, and is inapplicable to Hopkins Case. Echazabal upheld an equal employment opportunity commission (EEOC) regulation that allows an employer to refuse to hire an individuals whose health would be endangered by the conditions of employment. This affirmative defense to an ADA-based discriminatory hiring suit is not at issue here. Finally Lane upheld a suit against the state of Tennessee under the 6th amendments guarantee of right of access to the Courts pursuant to title II of the ADA. Hopkins claim is rooted in Title I, not Title II of the ADA, *does not concern access to the Courts, and is against a Corporation, not the State*. Accordingly, none of the aforementioned cases address the point of law Hopkins contests.

Further, Hopkins claim of duress, advance for the first time in his addendum is without merit. (Footnote: Hopkins testified that Store manager Beth Wright required him to wash dishes on May 12, 2001 despite his injury because the regular dishwasher had been fired. Defendants Exhibits, ExhA, Deposition of Glenn Hopkins., pgs 149-51. Hopkins mentions this event in his own motion for Summary judgment, and response to Defendants Motion for Summary Judgment, (d/e 61) However, Hopkins never claimed that Wrights order placed him under duress.)

Hopkins now contends that he was placed under duress when Wright ordered him to wash dishes based on the fact that as disabled person, he has fewer opportunities for employment and thus was compelled to comply with his supervisors order to wash dishes at work on May 12, 2001 in order to keep his job, thereby incurring the infection that kept him out of work from May 17 2001 to June 11, 2001. Plaintiffs addendum, pg 12.

This tardy argument is not based on newly discovered evidence, not is it supported by case law demonstrating that this Court made an error in of law or fact in August 20, 2004 Order, accordingly it is not a basis for reconsidering the Courts order.

Even if the Court considered Hopkins duress argument, However it is not supported by his deposition testimony. *Hopkins never testified that he contested Wrights order to wash dishes on May 12, 2001. In the following statements regarding that evening, Hopkins comments that he did help out with the dishes:*

*A: On May 12 2001, because of the Dishwasher getting canned, I was required by Wright to wash dishes, she says Take the bandages off and then wash your hands after youre done, there shouldn't be no problem.*

*Q: Ok.*

*A: Dummy Me, I kept going, I did help out with the dishes, and I have no feeling in my fingers.*

*Q. Ok.*

*A. So I didn't feel the rot starting until a couple of days later when they started bleeding...*

***

*A: Well, my hand started bleeding, and I went in to talk—to tell Wright on the 17th you know, that was the night I was supposed to start doing the dishes full time—*

*Q: Right.*

*A: She never talked to me about the dishes, I was willing to help out on doing the dishes for one or two nights and get this matter straightened out, but because my hands were bleeding, I Had to seek medical care.*

Defendants Exhibits, Exh A, Hopkins Deposition, Tr, pgs 150-51 (emphasis Added)

In addition Hopkins testified that he had refused Wrights Work orders on at least one earlier occasion *with no fear of reprisal*, and suffered no adverse employment action as a result. Hopkins testified:

A; And I didn't hesitate to Try, Like when Wright wanted me to scrub the floors. I did that, it took me a while, but I did that. You know it hurt a little bit but it needed done, but when she wanted to wash the walls, I told her no, I can't do that.

Q; When was that?

A; It was about late March.

Q; Ok, and how did She react?

A: She goes why. I said well I got brain damage as part of my disability, and I got zero balance.

You get me up on that ladder I'm going to fall off, an I'm going to get hurt, and youre going to be unhappy, and the boss—Your boss is going to be. And she says never mind.

Q; So when you told her you couldn't get up on the ladder to wash the walls, she said don't do it?

A; right, Right, She saw my Point, oh no never mind.

Q; So she was okay with you not doing it?

A. Uh-huh.

Id at 143. Accordingly, even if the Court was to consider Hopkins Duress argument, the Evidence submitted on the parties motions for summary judgment does not support it. Therefore Hopkins petition as to Count I are denied.

II COUNT II, RETALITATION

A Hopkins IDHR Charge.

In support of his claim that Wright retaliated against him by reducing his work hours, Hopkins submitted exhibit J, a document entitled Complaint of Discrimination and unfair labor practices in violation of the Americans with Disabilities Act. Exhibit J is a copy of a draft letter by Hopkins, it is unsigned, and dated June 24, 2001. It is not Hopkins IDHR charge, but rather a letter of complaint. From its face , it is unclear whether it was ever sent, and if it was sent, to whom it was sent. Its closing line states I will file this complaint as of June 25, 2001. If Godfathers agrees to a settlement then I will move to dismiss the charges.

On Hopkins Motion for Summary Judgment, the Court excluded Exhibit J from consideration, noting On motion for summary judgment however supporting affidavits must be sworn or certified. Fed. R. Civ. P. 56(e). Hopkins complaint to the IDHR is not a sworn statement. (August 20, 2004 Order.) Hopkins contends that this was an error of law, and that the Court should have considered Exhibit J. In support of this position, Hopkins refers the Court to the Supreme Courts Opinion in Edelman v Lynchburg College. Edelman v Lynchburg College 535 U.S. 106 (2002) Hopkins contends that under Edelman, Exhibit J was incorporated into his sworn IDHR charge and therefore should have been considered by the Court.(Foot note. Hopkins IDHR charge was attached to his Complaint,(d/e4) it is a signed and notarized statement executed on July 17, 2001.)

Hopkins misreads Edelman. In Edelman, the Supreme Court considered the purely jurisdictional question of whether a complainants charge, submitted to the EEOC under Oath but filed out of time could be related back to an earlier unsworn complaint filed within the statutory period. The Supreme Court found the earlier complaint saved his charge from being time barred. Edelman does not compel this Court to consider Plaintiffs Exhibit J as Plaintiff contests. Hopkins did attach his IDHR charge to his complaint, which summarized the allegations set forth in Exhibit J, and was considered by the Court. Only two allegations set

forth in Hopkins IDHR charge support his motion for summary judgment on his retaliation claim.

II.B.2. After I complained about the unlawful discrimination, my hours were gradually reduced (between 6/11/01 until 6/25/01) from 17 hours to 8 hours weekly.

IV.b.2 I was constructively discharged on 6/25/01 the Discriminatory actions leading to my departure were primarily the reduction of my hours and the fact another driver was given my previously assigned hours.
Complaint, Charge of Discrimination, pgs 2.3

Hopkins contention in II.B.2 is the subject of the payroll audit records submitted by Godfathers and was considered by the Court. August 20, 2004 Order, pg 15. Hopkins contention in IV.B.2 is an unsupported allegation contradicted by evidence produced by the Defendants, namely the payroll audits. Accordingly Hopkins had a burden to point to specific facts showing a genuine issue for trial. "when a motion for summary Judgment is made and supported as provided under this rule, an adverse party may not rest upon the mere allegations or denials of the adverse parties pleadings, but the adverse parties response, by affidavits or as otherwise provided under this rule must set for specific facts showing there is a genuine issue for trial. If the adverse party does not

so respond, summary judgment if appropriate shall be entered against the adverse party." Federal rule of Civil procedure 56(e).

Godfathers payroll audits represented evidence that Hopkins hours had been previously reduced to comparably low levels during the non retaliatory period, between January 22, 2001, through May 6, 2001, and that Hopkins was assigned the greatest number of hours if the part time delivery drivers then working for Godfathers in the allegedly retaliatory period, June 11, 2001 through June 24, 2001. (August 20, 2004 Order, pg 15-16.)

In response to this evidence, Hopkins could not rest on the unspecific allegations in his charge alone. There are no grounds to conclude the Court was in error of law or fact. Therefore Hopkins petitions are denied on this ground.

B. EVIDNCE REGARDING FLUNCTUATION IN WORK HOURS.

Hopkins claims his hours fluctuated in the non retaliatory period January 22, 2001 through May 6, 2001 due to moving his Home, March 29-30, the Easter holidays, birthdays, (March 4,) and Anniversary (April 3), none of the reductions were job related. Plaintiffs memoranda, pg 15. Under the rules 59(e) and 60(b)(2) a petitioner may only petition for the admission of new evidence. Hopkins *tardy attempt to explain why his work hours fluctuated during the nonretalitory period is not newly discovered evidence. Accordingly, the Court will not consider it.*

III. TIMING OF THIS COURTS AUGUST 20 2004 ORDER

Hopkins final claim is similarly unavailing. He contends:

"Plaintiff was preparing file a rebuttle to this Defendants reply that filed August 16, 2004 when Plaintiff received the order of final judgment closing these proceedings. It is apparent that this Court could not have and did not consider all the briefs and issues before this Court, and based on this Court Order, this Court has missed fact that could or would have led this Court to a different conclusion if taken in the proper context."

Without leave of Court, Hopkins had no right to file a rebuttle to the Defendants Reply to Plaintiffs response to Defendants Motion for Summary Judgment. (d/e 63). Local Rule 7.1 (B)(1) (D)(4). Further, without leave from th Court, Hopkins had no right to file his supplement to Plaintiffs Addendum and Reply to Defendants (sic) Response (d/e 70) Hopkins has no grounds for claiming that this Court could not have and did not consider all the briefs and issues before this court. Plaintiffs memoranda, pg 17.

Therefore Hopkins petitions are denied on this ground.

Conclusion. Therefore for the aforementioned reasons, Plaintiffs rule 60 (b)(6) Petition for relief from summary judgment (d/e 66) and Plaintiffs rule 60 (b)(6) Petition for relief from summary judgment (d/e 67) are denied. This case is closed.

Appendix C

FROM THE SEVENTH CIRCUIT COURT OF APPEALS USAP7, N0. 04-4172 July 13, 2005.

ORDER

In this Appeal, Glenn Joseph Hopkins claims that the district court abused it's discretion in denying his motion for relief from summary judgment with respect to his claims of discrimination and retaliation under the Americans with Disabilities Act(ADA) We Affirm*

I

Glen Hopkins began his employment as a part-time delivery driver for Godfathers Pizza on January 19, 2001. At the time, Godfather's Pizza was aware that Hopkins has a neuromuscular condition that limits his ability to lift and bend, and Godfathers Pizza indicated that it would accommodate his Disability. In addition to delivering Pizzas, Hopkins also was required to perform a variety of other tasks including mopping and scrubbing floors**, performing general cleaning, washing dishes**, folding boxes, and helping with the trash. If Hopkins was unable to perform any assigned task due to his disability he generally sought, and Godfathers Pizza Generally approved-an appropriate accommodation. For example, he was excused from taking out the trash when it involved heavy lifting, and he was excused from cleaning the walls when it required balancing on a ladder. Hopkins had no complaints about his

work environment through May 10, 2001. On May 10, 2001, Hopkins severely burned his left hand in a non-work related incident. He was excused from his dishwashing duties** on May 10-11 due to his injury, but was instructed by the Store manager Beth Wright to wash dishes on May 12. Wright again demanded that Hopkins wash dishes on May 17, 2001. The record is unclear as to whether Hopkins would be a dishwasher only on that date or if Wright intended the switch to be permanent. Hopkins was concerned that his now infected hand would not allow him to physically manage a permanent transfer to the dishwasher position* Hopkins unsuccessfully attempted to discuss his concern about the dishwasher position with Wright on May 17, 2001.**

While washing dishes on May 17, Hopkins hand began to bleed.* An assistant manager advised Hopkins to leave work and seek medical attention* On May 18, Hopkins returned with a doctors note. However, Wright informed him that he was fired for abandoning his job the previous day. Later that day, Hopkins protested his termination to Therese Piersee, Director of Human resources at Godfathers Corporate office. Piersee immediately overruled Wright's decision and instructed Hopkins to return to work as a delivery driver as soon as he received his doctors clearance to work again.*

By June 6, 2001, Hopkins hand had sufficiently healed that his doctor cleared him to work.

Hopkins returned to work on June 11, and worked 17.57 hours for the week of June 11 to June 17, 2001. He worked 9.05 hours for the week of June 18 to June 24, 2001. Hopkins asserts that he was only scheduled to work eight hours for the week of June 25 to July 1, 2001. Prior to his injury, Hopkins work hours had fluctuated from a low of 7.18 during the week of March 26, to April 2001, to a high of 24.87 hours for the week of February 26 to March 4, 2001. Overall, he averaged 18.47 hours per week. Godfathers explained that Hopkins work hours fluctuated based on store sales projections***

Hopkins complained to Wright about the reduction in is scheduled hours and told her he needed to work more hours to pay off an outstanding traffic ticket or risk losing his drivers license. When he complained to the Godfathers Pizza Human resources department, he was informed work schedules were within the discretion of the Store manager* Believing that he would never work a sufficient number of hours at Godfathers Pizza, Hopkins submitted his voluntary resignation to Piersee* on June 24, 2001. Hopkins then sent a letter* of complaint to the Department of Human Rights (IDHR) on June 25, 2001, alleging that Godfathers Pizza had retaliated against him for complaining about his working conditions and his brief termination.* He filed a formal charge on July 17, 2001.*

Hopkins initiated this present action in the United States District Court of the Central District of Illinois on August 13, 2002, alleging that Godfathers Pizza discriminated against him based on his physical disability and retaliated against him for complaining about his working conditions in violation of the Americans with Disabilities act.(ADA)* The District Court entered an order on August 20, 2004 granting defendants motion for summary judgment, and denied Hopkins cross motion for summary judgment. On September 10,* Hopkins filed a rule 60 (b)(6) motion requesting relief from judgment. The District Court entered an order denying this motion on November 16, 2004. Hopkins now appeals the district Courts denial of his motion requesting relief from summary judgment.*

II

The District Court appeared to be unsure whether Hopkins Motion for relief should be analyzed under Federal Rule of procedure 59(e) or 60(b). Both rules provide for relief from judgment on various grounds, but the more lenient rule 59(e) applies only to motions filed within ten days of the judgment at issue. See United States v Deutsch, 981 F.2d 299, 301 (7th Cir. 1992). Hopkins initial motion for relief was filed within the 10 day period, but it was not signed until the eleventh day. However nothing turns on the specific choice of rule.

*We review the District courts decision for abuse of discretion-and Hopkins claim for relief must fail under either rule. See Romo v Gulf Stream Coach Inc 250 F.3d 1119, 1121 n.3 (7th Circuit, 2001)*

Footnote- We note at the outset that Hopkins does not include Beth Wright as an individual defendant-Appellee in his brief, nor does he contest the District Court ruling that Wright, as an individual supervisor, cannot be liable for discrimination or retaliation under the ADA. But whether or not Hopkins intended to exclude Wright from the current appeal we pause to note that the district courts ruling on this was correct, silk v City of Chicago, 194 F.3d 788, 797 n.5 (7th Circuit 1999) and we will consider Godfathers Pizza as the sole Appellee .

Hopkins appeal alleges that the district Court abused its discretion when it held he had not made out a prima facie case of discrimination or retaliation under the ADA. To sustain either claim, Hopkins must demonstrate that he has suffered an adverse employment action. See Dvorak v Mostardi Platt Assocs. Inc, 289 F.3d 479, 483 (7th Circuit, 2002). (ADA Discrimination claim) Pugh v City of Attica, Ind. 359 F.3d 619, 630 n.9(7th Circuit 2001) (ADA Retaliation Claim). An adverse employment action is broadly defined as a materially adverse change in the terms and conditions of Employment, Cerros v Steel Techs. inc, 288 F.3d 1040, 1044 (7th Circuit 2002).

However Hopkins momentary termination and immediate reinstatement on May 18 2001 did not

alter the terms and conditions of his employment** for ADA purposes.

In fact the internal corporate appeals process functioned exactly as it was supposed to, reversing Hopkins termination on the same day it occurred** Likewise we cannot say the District Court abused its discretion in determining that the reduction of Hopkins hours was not an adverse employment action. Throughout the period covered by this appeal, Hopkins hours of work were within the range of hours he typically worked in a week. In addition, he was still scheduled to work more hours than any other part time delivery driver when he submitted his voluntary resignation. The district court did not abuse its discretion in determining that Hopkins has suffered no adverse employment action, and on this basis alone his discrimination and retaliation claims must fail.

Further, any discrimination claim based on Hopkins injured hand*** fails for the additional reason that his hand injury does not qualify as a disability under the ADA. An impairment only rises to the level of a disability when it's impact is permanent or long term, in re Toyota Motor mfg ky, Inc v Williams, 534 U.S. 184, 198 (2002). Intermittent episodic impairments are not disabilities the standard example being a broken leg. Vande v State of Wis. Dept. of Admin, 44 F.3d 538, 544, (7th Circuit 1995). Since Hopkins injured hand healed sufficiently within a month its impact was neither permanent nor long term. The District court did not abuse its discretion by

concluding that these injuries do not constitute a disability under the ADA.

Hopkins attempts to revive his claims by asserting he was under duress when he agreed to wash dishes on May 12, 2001, and that his resulting infected hand, absence from work, and lost pay constitute an adverse employment action.* This is a dubious argument even on its own terms, but in any event Hopkins has waived it by not raising it before the District Court. See Anderson v Flexel Inc. 47 F.3d 243, 247 (7th Circuit, 1995) (*Post judgment motions cannot be used to raise argument or legal theories that could have been and should have been brought before judgment,)* Bordelon v Chicago Sch. Reform Bd of Trs, 233 F.3d 524, 529 (7th Circuit 2000) (*Rule 59(e) does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the District Court prior to the judgment.)*

Hopkins also contends that the District Court abused its discretion* by excluding his letter to the IDHR as evidence supporting his retaliation claim. The District Court excluded the IDHR letter because it failed to satisfy the rule 56(e) requirement that supporting affidavits be sworn or certified. Fed. R. Civ. P. 56(e); Scott v Edinburg, 346 F.3d 752, 760 n.7 (7th Circuit, 2003). Hopkins himself acknowledges that the letter to the IDHR was neither sworn nor certified, and thus the District Courts exclusion of the letter was not an abuse of discretion.

Finally, Hopkins claims that the District Court's violated his due process rights when it failed to appoint Counsel to represent him. Hopkins asserts that appointed counsel was necessary because of his limitations resulting from a mental impairment. However this due process claim was not presented to the district court. We will not consider issues and arguments raised for the first time on appeal. Republic Tobacco Co v N. Atl. Trading Co. 381 F.3d 717, 728 (7th Circuit 2004).

III

For the foregoing reasons, we AFFIRM the District Courts denial of Hopkins motion for relief from judgment.

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FROM THE SEVENTH CIRCUIT COURT OF APPEALS USAP7, N0. 04-4172

Denial of Petition to reconsider En Banc

Before Judges Richard D. Cudahy, Terence T. Evens, Ann Claire Williams, Justices of the 7th Circuit Court of Appeals.

October 19, 2005.

ORDER

On Consideration of the petition of Plaintiff Appellant for rehearing with suggestion for rehearing en banc filed by Counsel July 26, 2005, all of the judges of the original panel have voted to deny rehearing, and none of the active judges on the Court have voted for a rehearing en banc. Therefore the Petition for Rehearing is DENIED.